No. 76-991

In the
Supreme Court of the United States
OCTOBER TERM, 1976

CONSTANCE KOTTIS, as Administratrix of the Estate of Christos Kottis,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPLICABLE STATE STATUTES

The questions raised upon petitioner's Petition for Writ of Certiorari involve the interpretation and application of the following provisions of the Indiana Workmen's Compensation Act:

> "*Indiana Code (I.C.) 22-3-2-6.* The rights and remedies herein granted to an employee subject to this Act . . . on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives,

dependents, or next of kin, at common law or otherwise, on account of such injury or death. . . ."

"*Indiana Code (I.C.) 22-3-2-13.* Whenever an injury or death for which compensation is payable under chapters 2 through 6 of this Article (22-3-2-1 through 22-3-6-3) shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee, or his dependents in case of death, may commence legal proceedings against such other person to recover damages. . . ."

QUESTIONS PRESENTED FOR REVIEW

Christos Kottis, while employed as a craneman by United States Steel Corporation [hereinafter referred to as "U. S. Steel"] and in the course and scope of his employment, suffered a fatal injury on an overhead crane located on the premises of U. S. Steel. The dependents of Christos Kottis, including Petitioner herein, entered into an agreement with U. S. Steel which provided that the injury was subject to the Indiana Workmen's Compensation Act and that the dependents were entitled to compensation thereunder. This agreement was filed with and approved by the Industrial Board of Indiana and by its terms was final and binding on the parties.

Subsequently, Petitioner brought a common law action against the employer, U. S. Steel, to recover damages for the fatal injury. The United States District Court for the Northern District of Indiana, Hammond Division, granted summary judgment in favor of U. S. Steel holding that Petitioner's action against the employer was barred by the provisions of the Indiana Workmen's Compensation Act. The Court of Appeals for the Seventh Circuit affirmed the decision of the District Court without dissent.

The questions presented for review are:

A. Whether the personal representative of an employee having applied for and received workmen's compensation from the employer under the provisions of the Indiana Workmen's Compensation Act is then entitled to maintain a third party action against the employer for the same injury in derogation of the exclusive remedy and third party action provisions of the Indiana Workmen's Compensation Act which provide that the sole remedy against the employer shall be workmen's compensation.

B. Did the District Court err in finding that the crane was manufactured, designed and built by Alliance Machine Company and purchased by U. S. Steel, and, if so, was such error harmless because the Indiana Workmen's Compensation Act bars any third party action against the employer on a theory of products liability for an injury compensable under that Act?

C. Did the Court err in refusing to grant relief under Rule 56(F) of the Federal Rules of Civil Procedure?

STATEMENT OF THE CASE

I. The Background.

Petitioner's decedent, Christos Kottis, was employed as a craneman by Respondent, U. S. Steel, at its Gary Ellwood Works, Gary, Indiana. On November 18, 1974, while Christos Kottis was so employed and performing his duties as a craneman assigned to #5316 E.O.T. crane located on the premises of U. S. Steel, he suffered a fatal injury.

On approximately July 15, 1975, the dependents of Christos Kottis, including Petitioner herein, entered into a Form 13 Agreement stating that Christos Kottis was an employee of U. S. Steel; that his death resulted from an accident arising out of and in the course of his employment; and that the provisions of the Indiana Workmen's Compensation Act applied to this accident. The Industrial Board of Indiana approved the Form 13 Agreement which recites by its terms that it is final and binding upon the parties.

The crane in question was purchased by U. S. Steel from Alliance Machine Company on October 1, 1948. It was designed and built by Alliance Machine Company. The only other entities which in any manner assisted Alliance Machine Company in the design, fabrication, manufacture or production, assembly or installation of hinged door grating devices of #5316 E.O.T. crane were Alliance Structural Fabrication and Eichleay Corporation. Since the purchase of the crane, U. S. Steel has performed normal maintenance on the crane when needed, including replacement of worn out parts such as the steel grating. This maintenance was performed in the ordinary course of the business operations of U. S. Steel. The design was still that of Alliance Machine Company.

II. The History of the Case.

On September 8, 1975 Petitioner brought a third party action against the employer, U. S. Steel. A subsequent Amended Complaint was filed on December 1, 1975 naming Alliance Machine Company and Eichleay Corporation as additional defendants. The Amended Complaint alleged, among other things, that Christos Kottis was only a business invitee on the premises and that U. S. Steel

was liable as a landowner of the premises. Petitioner also alleged that U. S. Steel was liable as the manufacturer and designer of part of #5316 E.O.T. crane.

On December 24, 1975 U. S. Steel filed its Motion for Summary Judgment alleging that Petitioner was barred from maintaining a third party action against the employer, U. S. Steel. At the same time U. S. Steel filed its Motion for Protective Order Pursuant to Rule 26(c) requesting that discovery be limited to the issues raised by the Motion for Summary Judgment until the court ruled on the motion.

The District Court granted the Motion for Summary Judgment holding as a matter of law that the exclusive remedy and third party action provisions of the Indiana Workmen's Compensation Act barred any third party action against U. S. Steel. The only facts necessary to reach that conclusion were indisputably established when Petitioner admitted that Christos Kottis was employed by U. S. Steel and was injured in the course and scope of his employment.

On February 25, 1976 the District Court entered final judgment in favor of U. S. Steel.

The Court of Appeals for the Seventh Circuit affirmed the decision of the District Court on October 18, 1976 without dissent holding that the third party action against U. S. Steel was barred and that its ruling on that issue made all other issues academic.

ARGUMENT

I. Indiana law has consistently interpreted the Indiana Workmen's Compensation Act to bar any third party action against the employer.

Petitioner seeks to justify review by this Court on two grounds. The first ground is that this is an important question of first impression. Secondly, Petitioner claims that the decision in the court below is not in accord with an alleged rule of statutory construction as set forth in *Reed* v. *The Yaka,* 373 U.S. 410 (1963). Neither of these assertions are justified.

The decisions below in the present case have become the most recent additions to a long line of cases both in the courts of Indiana and the Federal courts which have consistently and uniformly interpreted the exclusive remedy and third party action provisions of the Indiana Workmen's Compensation Act to bar third party actions against employers by employees for injuries suffered in the course and scope of employment. This interpretation is consistent wtih the plain language and intent of the Act.

Indiana Code 22-3-2-6 provides in part that:

> "The rights and remedies herein granted to an employee subject to this Act . . . shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or death. . . ."

Pursuant to this statute, it is conclusive that the rights and remedies provided by the Indiana Workmen's Compensation Act on account of an injury arising out of and

in the course of employment are sole and exclusive of all other rights and remedies, at common law or otherwise, against the employer. An uninterrupted line of Indiana decisions has consistently upheld this conclusion in a variety of situations.

> "The rights and remedies afforded by the Act . . . shall extend to all situations wherein, were there no Workmen's Compensation Act, an injured employee would have his remedy at common law for injuries received, and the Act should be so construed where its language reasonably admits to such construction, *the general purpose being to subsitute its provisions for pre-existing rights and remedies.*" (Emphasis added.)

In re: Bowers, 65 Ind. App. 128, 132, 116 N.E. 842 (1917); *Harshman* v. *Union City Body Co.,* 105 Ind. App. 36, 13 N.E. 2d 353 (1938) (*in banc*); *Runion* v. *Indiana Glass Co.,* 105 Ind. App. 650, 16 N.E. 2d 961 (1938) (*in banc*); *Pearson* v. *Rogers Galvanizing Co.,* 115 Ind. App. 426, 59 N.E. 2d 364 (1945) (*in banc*); *Seaton* v. *U. S. Rubber Co.,* 223 Ind. 404, 61 N.E. 2d 177 (1945); *Markham* v. *Hettrick Mfg. Co.,* 118 Ind. App. 348, 79 N.E. 2d 548 (1948) (*in banc*); *Stainbrook* v. *Johnson Co. Farm Bureau,* 125 Ind. App. 487, 122 N.E. 2d 548 (1948); *Burkhart* v. *Wells Electronics Corp.,* 139 Ind. App. 658, 215 N.E. 2d 879 (1966).

This question is not one of first impression for the Federal courts either. The Federal courts in interpreting Indiana law as set forth by the courts of that state have also consistently held that a third party action cannot be maintained against an employer for an injury subject to the provisions of the Indiana Workmen's Compensation Act. In *Hickman* v. *Western Heating & Air Conditioning Co.,* 207 F. Supp. 832 (N.D. Ind. 1962) the Court stated:

"The Workmen's Compensation Act provides that an employer bound by the Act shall be liable to any employee and his dependents for personal injury or death by accident arising out of and in the course of employment only to extent and manner specified in the Act. Burns Ann. Stat. 40-1205 (1962 Cum. Supp.) The rights and remedies granted to an employee subject to the Act on account of personal injury or death by accident are *sole and exclusive of all other rights and remedies against the employer.* Burns Ann. Stat. §40-1206 (1962 Cum. Supp.) In oher words, if an employer is subject to, and bound by the Act, an employee may seek recourse for injuries arising out of and in the course of employment only by proceeding before the Industrial Board of Indiana as prescribed by the Act. *The Act specifically abolishes common law actions against an employer subject to its provisions.*" *Id.* at 883-34. (Emphasis added)

Again in *Wilson* v. *Lehigh Safety Shoe Co.*, U.S. District Court, N.D. Ind. Civil No. 69 H 15 (App. 5-A), the District Court in an unreported decision specifically considered and rejected the dual capacity rhetoric. In that case the plaintiff, an employee of Bethlehem Steel Corporation and while so employed, was injured when a steel slab fell on his foot. Plaintiff filed suit on a theory of products liability against Lehigh Safety Shoe Company, the manufacturer of the metatarsal shoes he was wearing, and Bethlehem Steel Corporation as the retailer, since the shoes were purchased at a company store. Plaintiff argued he was entitled to maintain the action against the employer because of the dual capacity relationship of buyer-seller. (App. 1-A). The District Court rejected this argument citing *Peski* v. *Todd & Brown, Inc.*, 158 F. 2d 59 (7th Cir. 1946) which stated:

> "The Act provides by its own terms that the remedy shall be exclusive. Burns Ind. Stat., Sec. 40-1206. We think this means that where the employer is liable under the Act . . . the Act must furnish the exclusive remedy as to him, regardless of the fact, that if a third party were also liable, the employee might have the option to elect whether to proceed against him or the third party." *Id.* at 60.

On at least three previous occasions the Court of Appeals for the Seventh Circuit has been called on to determine whether a third party action could be maintained against an employer for an accident subject to the provisions of the Indiana Workmen's Compensation Act. On all three occasions the Court has held the third party action barred as to the employer. In *Peski* v. *Todd & Brown, Inc.*, 158 F. 2d 59 (7th Cir. 1946) plaintiff's decedent was killed in an accident while he was a passenger on a bus owned and operated by his employer for the transportation of employees to work. Plaintiff sued the employer for negligence in the operation of the bus and the question was whether the employer could also be liable at common law as the owner and operator of the bus. The Court found that the employee did not have both a common law remedy and a compensation remedy against the employer but one single exclusive remedy under the Compensation Act. As long as the employee was killed in an accident arising out of and in the course of his employment, with regard to that accident no other course of action can be maintained against the employer for ownership and operation of the bus. The Court followed this rule despite the fact that plaintiff would have had a third party action if someone other than the employer had owned and operated the bus.

In *Selby* v. *Sykes*, 189 F. 2d 770 (7th Cir. 1951) the plaintiff fell through a roof while engaged in his employ-

ment as a roofer. After obtaining workmen's compensation benefits, the plaintiff sued his employer claiming that the roof was in faulty condition and that the employer either knew or should have known of the faulty condition of the roof. The Court in rejecting plaintiff's argument that he could maintain an additional action against his employer for a dangerous condition cited the exclusive remedy provision and third party action provision of the Indiana Workmen's Compensation Act and held that so long as the accident arose out of and in the course of his employment, the employee had no other remedy against the employer based on a dangerous condition on the premises.

The most recent case in which a version of the dual capacity argument was rejected is *North* v. *United States Steel Corporation,* 495 F. 2d 810 (7th Cir. 1974). In *North* the plaintiff was injured when piping collapsed and hit him while he was working as an overhead crane operator. Plaintiff sued his employer for failure to provide a safe place to work and specifically for knowing that a dangerous condition existed on the premises. In *North,* the Court in rejecting plaintiff's argument stated that:

> "The Compensation Act specifically abolishes common law actions against an employer subject to its provisions . . . the remedies of the Act shall extend to *all situations where the employee would have his remedy at common-law if there were no Act,* and the Act should be so construed where its language reasonably permits such construction, since the general purpose of the Act was to substitute its provisions for pre-existing rights and remedies. *In re Bowers,* 65 Ind. App. 128, 116 N.E. 842 (1917)."

In the courts below and in this Court Petitioner has also advanced various public policy arguments in an

attempt to show that the decision appealed from is erroneous. However, these arguments scrupulously avoid any reliance on the public policy which gave rise to the passage of the Indiana Workmen's Compensation Act and which formed the basis for the specific statutory mandate that employers are not subject to third party actions.

Prior to the passage of the Indiana Workmen's Compensation Act, and indeed, most compensation acts, an injured employee faced sometimes inexorable obstacles to recovery. Even assuming he could prove negligence of the employer and avoid the common law defenses of contributory negligence, assumption of risk and the fellow-servant rule, he would inevitably face several years of litigation without any means of support, large attorney fees and various other expenses associated with litigation. According to one source, between seventy and ninety-four percent of all employees who sought to recover under the common law for injuries arising out of their employment received nothing. *Schneider's Workmen's Compensation Law,* Vol. 1, Sec. 1 (Perm. ed. 1971).

The Indiana Workmen's Compensation Act, like other compensation acts, addressed the situation and removed the obstacles faced by employees in a compromise statutory scheme. *See generally, Blair, E.N., Reference Guide to Workmen's Compensation Law,* Chapter 1, Section 1:00 (1971). The nature of the compromise is obvious. The employee is given a right to compensation irrespective of fault on either party, *Kinzie* v. *General Tire and Rubber Company,* 235 Ind. 592, 134 N.E. 2d 212, 216 (1956), and the employers' liability is limited to the benefits in the Act. *Hibler* v. *Globe Am. Corp.,* 128 Ind. App. 156, 147 N.E. 2d 19, 21 (1958). As stated in *North* v. *United States Steel Corp.,* 495 F. 2d 810 (7th Cir. 1974):

> "The purpose of the Workmen's Compensation Act was to remove obstacles and delays which had hindered the recovery of employees for injuries and to eliminate litigation. The employee was given a statutory right to compensation regardless of fault, and the employer's liability was limited to that provided in the Act." *Id.* at 813.

This legislative policy was further explained in *Stainbrook* v. *Johnson County Farm Bureau Co-op Assn.*, 125 Ind. App. 487, 122 N.E. 2d 884 (1954), where the Court stated:

> "In arriving at the intention of the legislature in the passage of section 6 of the act, we believe that section 6 substituted for the common law remedy a statutory proceeding by which an employer would be required to compensate those who suffer damage in industrial accidents regardless of fault on the part of the employer. The amount to be paid therefor to be fixed by the legislature, and, upon compliance with the Act, the employer was relieved of all further liability in the premises including rights of third parties.
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>
> The employer and employee in this case elected to have their rights determined according to the terms of the Act. By so doing, the common law remedy in tort follows by reason of a statutory contract for compensation based not upon the principal of tort but upon remuneration regardless of fault to the injured employee. . . . This seems to us to be the rational consequence of a changed relationship by consent of the parties affected under the act whereby the employer becomes immune from liability for the tort in consideration of the payment of compensation at a statutory rate regardless of fault." Id. at 886-887.

The public policy benefits upon which the Indiana legislature based the Indiana Workmen's Compensation

Act have clearly been fulfilled in the present case. Petitioner was able to obtain benefits from U. S. Steel in an expeditious manner without resorting to litigation and regardless of fault on either party. In return, liability of U. S. Steel is limited to payment of compensation benefits. Petitioner conveniently ignores the fact that benefits have been paid when they were most needed rather than denied to some indefinite time in the future and even then only contingent upon proof of negligence and failure to establish common law defenses.

Petitioner argues that as a matter of public policy U. S. Steel should not be allowed to avoid liability by payment of totally inadequate relief by way of compensation benefits. The solution to inadequate benefits under the Act is not to judicially abrogate the intent and plain meaning of the Act and allow a third party action against the employer but to urge the Indiana legislature to increase the statutory rate of compensation to provide adequate relief. This is a legislative and not a judicial problem.

Petitioner further argues that public policy should not allow the employer to shield himself from civil liability by invoking the exclusive remedy provision of the Indiana Workmen's Compensation Act. This argument has previously been raised and specifically rejected. In *Burkhart* v. *Wells Electronic Corp.*, 139 Ind. App. 658, 215 N.E. 2d 879, 881 (1966), the Court stated:

> "As to appellant's objection that an application of our Workmen's Compensation Act would shield the employer from his larger civil liability in this case we need only look to *In Re: Bowers, et al.*, (1917) 65 Ind. App. 128, 132, 116 N.E. 842, where this Court in speaking of the wisdom of the act said: 'Respecting cases when an employee may be awarded compensation on account of injuries received, the act is broader

and more inclusive than the common law; that is, there are many cases wherein under the act an employee may be awarded compensation on account of injuries received, when in an action at common law, he could be denied relief."

It must be kept in mind that Workmen's Compensation is founded on a contractual relationship. If employers are required to pay compensation benefits in all situations, whether or not at fault, and, in addition, are subjected to litigation in common law actions in other capacities, then there is no benefit to them to maintain the contractual relationship. Employers would then favor exempting themselves from the Act since then they would only have to pay when they were at fault.

The public policy upon which the Indiana Legislature acted in establishing the statutory scheme clearly supports a denial of third party liability against the employer. This is the public policy which the statutory scheme was intended to accomplish. The arguments which Petitioner advances as public policy not only run counter to legislative policy sought to be achieved but in fact would negate that policy by requiring employers not only to pay compensation benefits in all cases but also to be subjected to potential tort liability in common law actions as a third party.

The preceding cases demonstrate clearly that the issue and its public policy considerations which are presented to this Court for review are not matters of first impression but have been decided on numerous occasions in a variety of fact situations both by the Indiana courts and the Federal courts applying Indiana law. These decisions as well as the one in the present case are consistent with the language, intent and public policy of the

Indiana Workmen's Compensation Act. It is true that the preceding cases do not use the label "dual capacity" but the argument is the same, could the employer also be liable as an owner and operator of a bus (*Peski*), and could the employer also be liable as the owner of a defective machine (*Harshman*). Without the label "dual capacity" Petitioner, in the present case is merely making the same argument by posing the question could U. S. Steel also be liable as a landowner for the violation of a landowner's duties and as a manufacturer of a product for violation of certain duties. The Court's conclusion in these cases is the same conclusion that has been reached in the present case. As long as the injury occurred within the course and scope of employment, any third party action against the employer in any capacity is barred whether it be owner of a bus, owner of a machine or owner of a building.

Petitioner has relied on various decisions from states other than Indiana to support her position. None of these cases involved the application of the Indiana statute in question. It is the responsibility of the Indiana courts to interpret and apply the laws of their own state. Once the Indiana courts have discharged that responsibility it is the duty of the Federal courts to interpret and apply state statutes consistent with the decisions of the courts of that state. The decisions of the Indiana courts have steadfastly and consistently denied third party actions against employers for workmen's compensation injuries. Reliance on decisions from other jurisdictions to reach a contrary result would involve a most inappropriate exercise of judicial power by the Federal courts. The Court of Appeals for the Seventh Circuit reached this conclusion when it stated that: "[p]laintiff also cites decisions from other states which defendant distinguishes

but which we are not in any event persuaded Indiana courts would follow." (App. p. xvii fn. 2).

The second basis relied on by Petitioner to justify review by this Court is that the decision reached defies a rule of statutory construction in *Reed* v. *Yaka,* 373 U.S. 410 (1963).

In the *Reed* case, the plaintiff was a longshoreman who was injured while engaged in loading a ship. He recovered compensation under the Longshoremen's and Harbor Workers Compensation Act against his employer and then filed an *in rem* action against the Steamship Yaka for violation of the obligation of seaworthiness of the vessel. Plaintiff's employer was operating the ship under a bareboat charter and hence was the person liable for unseaworthiness of the vessel. The Court, in a very obvious attempt to avoid abolishing the traditional, well established and unique doctrine of seaworthiness, followed a rather tortured argument based primarily on the unique status of the "traditional remedies of the sea" and completely avoided the specific language of the Longshoremen's Act to reach the result which it achieved. It is particularly important to note that the Court admitted that the literal language of the exclusive remedy provision of the Longshoremen's Act would preclude the action. The Court could avoid this result only by asserting that the congressional intent of the Act could not possibly have been to preclude suits under the "traditional, absolute, and nondelegable obligation of seaworthiness". The Court stated:

> "We have previously said that the Longshoremen's Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. We think it would produce a

> harsh and incongruous result, one out of keeping with the dominant intent of congress to help longshoremen . . . [to bar actions for unseaworthiness under the Longshoremen's Act]."

Id. at 453.

The *Reed* case is not applicable to the present case for several reasons. The primary reason was aptly stated by the Court of Appeals for the Seventh Circuit when it stated in its opinion below that "the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 . . . does not of course control the interpretation to be given an Indiana statute by the courts of that state." (App. p. xvi).

A second reason the *Reed* case is not applicable is that the Court's decision could not have been reached but for its interpretation of the presumed intent of Congress which ran contrary to the plain meaning of the exclusive remedy language. This interpretation was subsequently repudiated by Congress itself when it passed an amendment to the Longshoremen's Act which nullified the decision in *Reed* and, in effect, declared that the congressional intent was to have the exclusive remedy of the Longshoremen's Act preclude actions against an employer based on the doctrine of unseaworthiness. The amendment states:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring *an action against such vessel as a third party* in accordance with the provisions of Section 933 of this Title *and the employer shall not be liable to the vessel for such damages directly or indirectly* and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subject

section shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." (Emphasis Added)

33 U. S. Code § 905(b) (Supp. 1972).

The final reason that the *Reed* case is not persuasive authority in the present case to support a dual capacity argument is seen from the nature of the action itself. An action based on the unseaworthiness of a vessel is an *in rem* action against the vessel and not against any person. Therefore, the employee was not suing his employer in a dual capacity but was in effect suing a separate entity, namely the vessel itself. It was only indirectly through contractual arrangements that the employer would become liable to his employee as a result of a judgment against the vessel. The importance of this distinction is noted in the dissenting opinion in which Mr. Justice Harlan states:

> "Under a statute which was specifically written to include ship owners who employed their own dock workers, and which excluded liability at law *or in admiralty*, there is no room for concluding that an employer ship owner can be held liable to his own longshoreman employee for unseaworthiness. Indeed, the point is so clear that petitioner has had what I would have thought was the good sense not even to argue to the contrary. (He has instead based his argument wholly on the theory that the ship itself may be liable even in the absence of any underlying personal liability on the part of anyone."

Reed, supra at 454. Section 905(b) just cited above also specifically recognizes that the vessel is a separate entity and is itself the "third party" and not the employer in a dual capacity. The statute specifically states that "a person . . . may bring an action against such *vessel* as a *third party* . . . and the employer *shall not be liable to the vessel* for damages.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied by this court.

II. The District Court properly found that U. S. Steel was not a manufacturer or designer under a theory of products liability and even if such finding was error, it would be harmless in light of the exclusive remedy provision of the Indiana Workmen's Compensation Act.

Discovery from both U. S. Steel and Alliance Machine Company established that the crane in question was purchased by U. S. Steel from Alliance Machine Company approximately October 1, 1948. Alliance Machine Company, in cooperation with Eichleay Corporation and Alliance Structural Fabrication manufactured, designed and erected the entire crane between 1949 and 1950.

In the intervening years U. S. Steel performed routine maintenance on this crane in connection with its normal business operations. In connection with this maintenance, U. S. Steel purchased standard steel grating, cut it to size and merely replaced the old with the new. Replacement of worn-out parts as a part of maintenance does not make U. S. Steel liable in products liability action as a manufacturer or designer of a product as those terms are used in connection with products liability.

However, the holdings of the District Court and the Court of Appeals for the Seventh Circuit that the Indiana Workmen's Compensation Act barred a third party action against the employer on any theory makes the question of whether U. S. Steel was a manufacturer or designer under a theory of products liability moot.

III. The District Court did not err in denying petitioner relief under Rule 6(F) of the Federal Rules of Civil Procedure.

The primary basis upon which the District Court granted Respondent's Motion for Summary Judgment was that the provisions of the Indiana Workmen's Compensation Act bar any third party action against the employer, U. S. Steel, for injuries to its employee, Christos Kottis, from an accident arising out of and within the course of employment. In order to so hold, the District Court only had to factually determine whether Christos Kottis was an employee of U. S. Steel at the time of the accident and that the accident arose out of and was within the course of that employment. These facts were admitted by Petitioner on the record. U. S. Steel cannot conceive how any further discovery would in any manner alter these factual conclusions reached by the Court.

Under Rule 56 of the Federal Rules of Civil Procedure, Petitioner was also entiled to take depositions and to use these to oppose the Motion for Summary Judgment of U. S. Steel. Yet, despite all of Petitioner's protestations that she could not obtain crucial discovery from U. S. Steel, Petitioner never took a single deposition in the six month period from the time the original complaint was filed until the Order granting Summary Judgment. Nor did Petitioner ever request time to take depositions of employees of U. S. Steel who had knowledge of facts deemed relevant to the Petitioner. It seems incongruous that Petitioner can avoid what, in all probability, was the best, easiest and quickest method of obtaining whatever discovery she deemed relevant and then claiming that she had no way "to gain access to the necessary

information through pre-trial discovery procedures in order to oppose the Motion for Summary Judgment".

CONCLUSION

For the reasons set forth above, it is respectfully submitted that Petitioner's Petition for Writ of Certiorari should be denied. As the Court of Appeals for the Seventh Circuit stated in affirming the decision of the District Court, if an interpretation such as Petitioner's which would result in devastating inroads into the Indiana Workmen's Compensation scheme is to be adopted, its author should be an Indiana court and not a Federal court whose duty is to apply state law as laid down by the courts of the state.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Indiana
Hammond Division

No. 69 H 15

DANIEL S. WILSON, JR.

Plaintiff,

vs.

LEHIGH SAFETY SHOE COMPANY, A Pennsylvania Corporation, and BETHLEHEM STEEL CORPORATION, A Delaware Corporation,

Defendant.

PLAINTIFF'S BRIEF ON DEFENDANT'S MOTION TO DISMISS
(Filed Jun 19 1969)

Defendant Bethlehem Steel Corporation has filed a motion to dismiss this cause as to said defendant corporation, asserting as grounds therefor that plaintiff's exclusive remedy is under the Indiana Workmen's Compensation Act and exclusive jurisdiction lays with the Indiana Industrial Broad (sic).

Plaintiff concedes that where the employer-employee relationship has been established by contract between two persons, natural or corporate, unless the parties agree to the contrary or the employment is exempt under the Act, in the event of injury or death suffered by such employee arising out of and in the course of his employment, the parties are bound to pay and accept compensation under the Act for such injury or death. However, where an additional relationship such

as the buyer-seller relationship co-exists with the employer-employee relationship at the time such an injury is incurred, such injured party may proceed as an employee covered by the Act before the Indiana Industrial Board; and, further, may prosecute an action before the Courts of general jurisdiction based upon causes of action available to such injured person arising out of the relationship of buyer and seller even though the seller was at the time of injury the employer of the injured party and such party was injured by accident on the job.

It is clear the legislature intended to make this Act apply only when the employer-employee relationship has been established by contract. Burns 40-1202 reads, in part, as follows:

> "From and after the taking effect of this Act. . ., every *employer* and every *employee,* . . . shall be presumed to have accepted the provisions of this Act, . . . and shall be bound thereby; . . ."

Burns 40-1204 reads, in part, as follows:

> "Every *contract* of service between any employer and employee covered by this Act, written or implied, . . . shall be presumed to have been made subject to the provisions of this Act: Unless either party, . . . shall give notice, . . . to the other party to such *contract.* . .".

Burns 40-1210, 40-1211 and 40-1212 deal with common law actions and defenses available to employers and employees not operating under the Workmen's Compensation Act. Clearly, these sections show that the only abrogation and pre-emption of the common law intended by the legislature at the time this Act was passed were those causes of action and defenses which arose out

of the employer-employee (master-servant) relationship. Burns 40-1205 says:

> "The rights and remedies herein granted to *an employee subject to this Act* . . . on account of personal injury or death by accident shall exclude all other rights and remedies *of such employee,* . . . at common law or otherwise on account of such injury or death . . ."

By implication it is clear that the legislature intended all other causes of action and all other defenses arising from other relationships which could exist contemporaneously with the employer-employee relationship would remain undisturbed by the passage of this Act.

The Act, moreover, specifically preserves causes of action for injuries sustained on the job arising out of relationships other than the employer-employee relationship. Burns 40-1213 reads, in part, as follows:

> "Whenever an injury . . . shall have been sustained under circumstances creating in some other person than the employer and not in the same employ and legal liability to pay damages in respect thereto, the injured employee may commence legal proceedings against such other person to recover damages, *notwithstanding* such employer's . . . liability to pay compensation under this Act. . . ."

This section of the statute, at first blush, would appear to abrogate any conceivable common law causes of action where persons stand in the relationship of employer-employee at the time of injury regardless of what relationship in addition to the employer-employee relationship existed at such time. Statutes in derogation of the common law are strictly construed, however, and the Act nowhere deals with the dual relationship situation.

By construction, therefore, it is apparent the legislature intended to preserve all other common law causes of action and all other common law defenses available to persons in dual relationships at the time of injury on injury on the job, even though one of such relationships was that of employer-employee.

A careful reading of plaintiff's complaint demonstrates that plaintiff does not rely upon the employer-employee relationship in stating its various causes of action against defendant Bethlehem Steel Corporation. Plaintiff does, in fact, rely upon the buyer-seller relationship established when plaintiff purchased from said defendant a week before the accident the safety shoes he was wearing at the time be was injured.

When said defendant voluntarily chose to become a retail shoe merchant in addition to being a producer of iron and steel, said defendant corporation voluntarily removed itself from immunity from suit at common law granted employers by the Indiana Workmen's Compensation Act and became subject to all lawsuits arising from and out of the day to day buyer-seller relationships it voluntarily entered into thereafter with its employees. Plaintiff, as a customer of said defendant retail shoe seller, alleges in his complaint that he was injured by virtue of the acts and omissions of said defendant corporation as a retail shoe merchant and that such acts and omissions of defendant as such were proximate and contributing causes of plaintiff's injuries.

In B.A.Y. Construction Company v. Smallwood et al, (1937) 10 .E. 2nd 750, 104 Ind. App. 277, the Indiana Appellate Court said "The words 'by accident arising

out of' the employment, as used in the Workmen's Compensation Act . . . should be liberally construed, so as to accomplish the humane purposes of the Act." The Act's humane purpose was to give injured employees a speedy means of compensation for injuries suffered by virtue of risks necessarily incurred as such employees. It certainly serves no humane purpose to bar a product liability claim by a strained construction of the coverage of the Workmen's Compensation Act. The Supreme Court of Indiana in Noble v. Zimmerman (1957) 146 N.E. 2nd 828, 237 Ind 556, limited the application of the Workmen's Compensation Act to injuries which arise "out of a risk which a reasonable person might have comprehended as incidental to his employment at the time of entering into it. . . .", 146 N.E. 2nd 838. Certainly, the risk of injury because of defective safety shoes is not a risk incidental to plaintiff's employment by defendant Bethlehem Steel Corporation. The risks incurred by virtue of negligence, breach of warranty, etc., arising out of the sale of safety shoes by said defendant corporation to plaintiff and the causes of action accruing to plaintiff by virtue thereof were certainly not meant to be abrogated or pre-empted by the legislature when it passed the Workmen's Compensation Act. Such causes of action are available to plaintiff against the defendant even though the employer-employee relationship existed at the time of plaintiff's injury. Plaintiff may proceed in this action before this Court against said defendant as a retail shoe merchant, on the causes of action stated in his complaint.

This action should not be dismissed as to said defendant Bethlehem Steel Corporation.

Respectfully submitted,
/s/ William G. Conover
Attorney for Plaintiff

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462-0505

A True Copy:
Attest: Francis T. Grandys, Clerk
By /s/ Hildred Bolsega
Deputy Clerk

ORDER

On February 13, 1969, defendant Bethlehem Steel Corporation moved for dismissal of the action as to it for lack of jurisdiction of the subject matter. The motion is Granted.

/s/ George C. Beamer
U. S. District Judge

Enter: August 14, 1969

MEMORANDUM

While working for Bethlehem Steel Corporation, plaintiff was injured when a piece of steel fell on his foot. Plaintiff was wearing the safety shoes with metatarsal protectors he had purchased at the company store maintained by Bethlehem Steel Corporation at the steel mill where plaintiff worked. Plaintiff alleges that the metatarsal protectors failed, causing his injury.

Defendant Bethlehem Steel Corporation seeks to have the action dismissed as to it on the ground that this Court has no subject matter jurisdiction, because the Indiana Workmen's Compensation Act applies and establishes plaintiff's exclusive remedy against his employer. The relevant statutory provision is Burns' §40-1206:

> The rights and remedies herein granted to an employee subject to this act . . . on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death. . . . .

Plaintiff claims that Bethlehem's Steel's act in selling the shoes to the plaintiff was outside the scope of his employment. It is therefore plaintiff's contention that the Indiana Workmen's Compensation Act is inapplicable. This contention is unsupported by the facts in this case and the law of Indiana.

In *Peski* v. *Todd & Brown, Inc.*, 158 F.2d 59 (C.A. 7, 1946), plaintiff's decedent was killed when a train struck the bus in which he was riding to work. Defendant, decedent's employer, owned and operated the bus line for the transportation of its employees from their residences to the plant. Only employees were entitled to use the buses, and they paid the same fare as was paid on common carriers in the vicinity for the same service. Employees were not required to use the company buses. The employees were not under the control of the employer while traveling on the buses and were not paid for the time spent on them. District Judge Swygert dismissed the action stating that the accident occurred in the course of employment, and relief was limited to that under the Workmen's Compensation Act of Indiana. The Seventh Circuit Court of Appeals affirmed, holding at page 60:

> [I]t does not appear that where the *employer* operates the conveyance for the special use of the employee as an incident of the employment, the latter may elect his remedy, whether to proceed as at common law for negligence, or under the Compensation Act. The Act provides by its own terms that the remedy shall be exclusive. Burns' Indiana Statutes, sec. 40-1206. We think this means that where the employer is liable under the Act . . . the Act must furnish the exclusive remedy as to him, regardless of the fact that if a third party were also liable, the employee might have the option to elect whether to proceed against him or the third party. (Emphasis supplied.)

Plaintiff states in rhetorical paragraph 4 of his complaint that defendant Bethlehem Steel Corporation maintained its company store offering for sale at retail to its employees safety equipment, including safety shoes with metatarsal protectors, "to be used by said employees while on their jobs in said steel mill." In rhetorical paragraph 5, plaintiff states that he purchased a pair of these safety shoes with the metatarsal protectors to protect his feet from heavy weights "while engaged in his duties as an employee in said steel mill." It is clear from these statements and from the holding in the *Peski* case, that the purchase of safety shoes by plaintiff from defendant Bethlehem Steel Corporation arose out of and in the course of plaintiff's employment. Plaintiff's remedy under the Indiana Workmen's Compensation Act is exclusive. This Court has no jurisdiction as to defendant Bethlehem Steel Corporation, and the action must be dismissed as to it.

A True Copy:

Attest: Francis T. Grandys, Clerk

By /s/ Hildred Bolsega
Deputy Clerk